II. Proceedings in the Supreme Court of Illinois

State Farm then petitioned for leave to appeal to the Supreme Court of Illinois. On October 2, 2002, the Court, with one judge (Rarick, J.) not participating, granted leave to appeal. *Avery v. State Farm Mut. Auto. Ins. Co.*, 201 Ill.2d 560, 786 N.E.2d 180 (2002). The issues raised by State Farm were extensively briefed, with oral argument occurring, and the case being submitted for decision, on May 14, 2003.

Under the Illinois Constitution, the Supreme Court of Illinois "shall consist of seven judges." Three are selected from the First Judicial District (comprising Cook County), the other four are selected from each of the other four judicial districts. *Ill. Const. Art. VI* §§ 2, 3. Absent the concurrence of four judges on the Supreme Court of Illinois, no Appellate Court opinions can be overturned. *Ill. Const. Art. VI*, § 3. Under the Illinois Constitution, judges on the Supreme Court of Illinois are nominated through partisan primary elections or by petition and then "shall be elected at general or judicial elections as the General Assembly shall provide by law." *Ill. Const. Art. VI*, § 12(a). Illinois places no limits on the amounts or sources of campaign contributions that a candidate, judicial or otherwise, may accept. Individuals, corporations, and groups, including political action committees, may all donate to judicial campaigns. The Illinois Election Code, 10 ILCS 5/9-1, et seq., imposes disclosure requirements on candidates and groups which accept contributions or make expenditures.[2]

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[2] Unfortunately, the rules are sometimes ignored. For example, in this case Citizens for Karmeier received a direct donation of $8,000; and indirect donations of up to $150,000 that were funneled through an organization called "JUSTPAC," from the "Illinois Coalition for Jobs Growth and Prosperity." The Coalition's failure to register under the Illinois Disclosure Act, or to reveal the

While this matter was pending and no decision had been issued, the seat of the Justice on the Supreme Court of Illinois representing the appellate district from which this case arose (the Fifth Appellate District) came open as a result of the retirement of Judge Rarick. The candidates for this open seat in the November 2004 election were Appellate Judge Gordon Magg, who had authored the underlying Appellate Court opinion (and who therefore would not have been able to sit in further judgment on this matter had he been elected) and then-circuit court Judge Lloyd Karmeier. In a race which was described by the press as one of the "most bitter" and "most expensive" judicial elections in history, Judge Karmeier raised and spent over $4.8 million and was elected on November 4, 2004.

III. Petitioners' Motion for Conditional Non-Participation is Denied

Perhaps not surprisingly, of the more than $4.8 million which disclosure statements later showed to have been raised and spent by and on behalf of Justice Karmeier, much came directly from State Farm and its agents or from groups of which State Farm was an active member and supporter. Petitioners therefore fully expected that Justice Karmeier would recuse himself under ABA Canon 3(c)(1), which had been codified as Ill. Sup. Ct. Rule 63(C)(1), and controlling Due Process principles. When this did not occur, Petitioners filed a *Conditional Motion for Non-Participation* with the Supreme Court of Illinois on January 26, 2005. (App. 288-311). This motion noted that, perhaps through oversight, Justice Karmeier had not recused himself, and it contended that the close connections between State

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source of its funds, is currently the subject of a complaint filed with the Illinois State Board of Elections. *See* http://www.ilcampaign.org/ (providing link to the complaint).

Farm and Justice Karmeier's campaign required recusal. The motion was accompanied by a voluminous authenticated record, including the following evidence to support the recusal motion:

First, the race in question happened after the Supreme Court of Illinois had accepted review of this case in 2002, briefing was completed, and oral argument was heard and the matter submitted on May 14, 2003. This case was therefore *pending* before the Supreme Court of Illinois, and had been pending for well over a year, at the time of the race in question.

Second, at the time of this election, the outcome of this case had become a major issue that was widely anticipated to affect other parties facing similar litigation (including Allstate and other insurers that had also been sued over their use of non-OEM crash parts in similar suits). Enormous sums of money would be won or lost based upon the outcome of this case. As Petitioners showed, and as State Farm never denied, now-Justice Karmeier, his supporters Ed Murnane and Bill Shepherd (both of whom were connected to State Farm) and a group of organizations Mr. Murnane founded, including the Illinois Civil Justice League, and JUSTPAC, were well aware of the pendency of this lawsuit. The evidence showed, and it was not disputed by State Farm, that State Farm lawyer and lobbyist Bill Shepherd was instrumental in the founding of these groups, and that State Farm *directly* provided funding to them. The evidence further showed that Mr. Murnane in particular was aware of this case, felt it was unfair and should be overturned, and personally recruited Justice Karmeier to run for the Supreme Court of Illinois.

Third, once Mr. Murnane and his State Farm-funded and supported groups had recruited Justice Karmeier to run, they financed his race with massive contributions. For example, JUSTPAC gave Justice Karmeier a total of $1,191,453 in donations. From the

perspective of the donors to JUSTPAC, Justice Karmeier, and the public, these donations were the equivalent of direct contributions to Justice Karmeier's campaign because all but $500 of the funds raised by JUSTPAC (0.04%) were given to Justice Karmeier's campaign. Also notable was $269,338 from the Illinois Chamber of Commerce, and total donations by the U.S. Chamber of Commerce of over $1.3 million to the Republican Party of Illinois, which were in turn passed directly on to Judge Karmeier's campaign. As Petitioners showed, State Farm employees were Directors of both organizations and both donating organizations were also members of, and major supporters of JUSTPAC, and through it Justice Karmeier.[3]

Although, as Petitioners admitted, most of the funds given to Justice Karmeier's campaign cannot be traced beyond their source in organizations of which State Farm is a member and contributor, it was also shown that over $350,000 of the direct donations to Justice Karmeier's campaign could *be directly traced* to State Farm's employees, lawyers, or amicus and lawyers representing amicus in this case. In addition, as Petitioners showed, many hundreds of thousands of dollars were given to Judge Karmeier's campaign by State Farm employees, agents, and amicus through JUSTPAC, including $1000 given directly by Edward B. Rust, State Farm's Chairman and CEO and a witness at this trial below.

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[3] As Petitioners also showed, huge sums of money were directed to Justice Karmeier's campaign by three other groups — the Illinois Coalition for Jobs, Growth and Prosperity ($150,000), the American Tort Reform Association ($415,000), and the Illinois Insurance Political Committee ($6000). State Farm was a member of and contributor to all of these groups . *See Non-Participation Mot.* at 19-22 (App. 308-310).

Fourth, and finally, the motion showed that there is no doubt that the results of the race were correctly perceived by the public as an election bought by big money. For example, on November 5, 2004, the *St. Louis Post Dispatch* (which endorsed Justice Karmeier) ran an editorial stating that "Big business won a nice return on a $4.3 million investment in Tuesday's election. It now has a friendly justice on the Illinois Supreme Court. * * * And anyone who believes in evenhanded justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat." The editorial described the election as an "ugly, dispiriting, destructive, misleading, money-drenched race." The article suggested that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time." *Buying Justice*, St. Louis Post-Dispatch, November 5, 2004, at B06.

Tellingly, State Farm filed an opposition to Petitioners' Non-Participation Motion. Yet, this opposition did not deny, let alone refute, the factual showing made by Petitioners of the clear appearance of impropriety if Justice Karmeier were to sit on this case. Instead, it asserted (1) that the facts shown did not require recusal as the standard was not the appearance of impropriety; and (2) the motion "appears to be part of an attempt to prevail in this case by securing Justice Karmeier's disqualification." *Opposition of Defendant-Appellant State Farm Mutual Auto. Ins. Co. to Plaintiffs-Appellees' Conditional Mot. for Non Participation*, at 15 (App. 281).

Petitioners then filed a *Memorandum in Response to Appellants' Opposition* which further supplemented the record with additional materials supporting recusal, refuted State Farm's claim that the appearance of impropriety was not the standard, and noted how State Farm's own opposition—which, in effect, conceded that

State Farm itself believed Justice Karmeier's vote was a vote in its camp—supported recusal.

On March 16, 2005, the Court below denied Petitioners' motion, ruling that the subject of Justice Karmeier's recusal was up to Justice Karmeier and was not subject to further review by the Illinois Supreme Court. (App. 225). On May 20, 2005, the Court below issued a second order stating that, because Justice Karmeier had declined to recuse himself, Petitioners' recusal motion was now "moot." (App. 223-4).

IV. Petitioners Seek Rehearing After The Issuance Of The Opinion Below On Which Justice Karmeier's Vote Was Decisive On A Major Portion Of The Case

On August 18, 2005, the Supreme Court of Illinois issued its Opinion in this case, well over two years after the case was argued. One justice, Justice Thomas, recused himself and took no part in the consideration or decision of the case. (App. 112, 216 Ill.2d at 511, 835 N.E.2d at 864).

A majority opinion by then Chief Justice McMorrow joined by three other Justices reversed the award of $600 million in punitive damages under the ICFA, finding that the ICFA did not apply to the claims of Class members residing outside of Illinois. (App. 92, 216 Ill.2d at 502, 835 N.E.2d at 855). This portion of the Court's opinion was joined by a separate concurrence in part by Justices Freeman and Kilbride, thus making the decision as to this portion of the opinion unanimous.

As to the breach of contract claims, these same four justices overturned the award of $456,636,180 to the Class in its entirety on the grounds that the damages awarded were the result of "improper speculation," because, according to these four justices, the term "like kind and quality" was unambiguous and did not require

that any replacement parts be of OEM quality, and because, according to the majority, State Farm's contractual obligation varied such that the nationwide Class should not have been certified.

Two Justices dissented as to these breach of contract holdings. However, these two justices believed that their interpretation of State Farm's contractual obligation (which was based on rules of construction and the evidence as to how State Farm itself interpreted the obligation) might conflict with the rule in certain other states; they therefore would have "remand[ed] the cause to the circuit court to determine whether there exists any subclass of the nationwide class with respect to which the verdict may be upheld" under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (App. 142, 216 Ill.2d at 526, 835 N.E.2d at 879). Therefore, the portion of the Opinion addressing the Class's breach of contract claims had the four votes required by the Illinois Constitution only because it was joined by Justice Karmeier. Absent Justice Karmeier's participation, only those parts of the court's opinion joined by the two dissenting Justices would have had the four votes required by law and hence the force of law.

Thus, as reflected in the dissenting opinion, the Class members' contract claims (valued at up to $465 million) would have been remanded to the Williamson County Circuit Court for further proceedings under this court's seminal *Phillips Petroleum* decision (recently reaffirmed unanimously by this court as the Constitutional choice-of-law touchstone in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003)).[4]

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[4] As this Court indicated in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003), the determination and award of damages to a class of State Farm policyholders would be appropriate consistent with their "inclusion" in this case and the conduct of an appropriate choice of law determination under *Phillips*

Accordingly, there is no doubt that Justice Karmeier "cast [] the deciding vote" on a very substantial portion of this case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Because Justice Karmeier's participation in this case had turned out to be decisive, on September 8, 2005, Petitioners moved for rehearing and again challenged Justice Karmeier's participation. As this motion argued, because of the massive support given to Justice Karmeier during the pendency of this case by State Farm,

> [T]he decisive participation of Judge Karmeier in this case violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Illinois law in that: (1) [the Supreme Court of Illinois] allowed Justice Karmeier to himself determine the recusal motion challenging his impartiality in violation of the due process requirement that "no man can be a judge in his own case," *In re the Matter of Murchison*, 349 U.S. 133, 136 (1955) , and (2) that the huge support provided to his election by State Farm and its supporters *during the pendency of this case* [in the Supreme Court of Illinois] violates Due Process in that it "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true." *Lavoie*, 475 U.S. at 825 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

Petroleum Co. v. Shutts, 472 U.S. 797, 821-822 (1985).

Plaintiffs-Appellees' Motion for Rehearing at 1-2. (App. 228). As Petitioners argued, most importantly, "under the due process clause of the Fourteenth Amendment 'justice must satisfy the appearance of justice,'" *Aetna*, 475 U.S. at 825 (citations omitted) and Justice Karmeier's decisive participation in this case could not satisfy that test, which requires rehearing after Justice Karmeier's recusal. (App. 228).

On September 26, 2005, the Supreme Court of Illinois, with now Chief Justice Thomas having again recused himself, but Justice Karmeier sitting, denied rehearing without comment. (App. 222).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with the Rationales of this Court's Due Process Holdings on the Right to a Fair and Impartial Judicial Decisionmaker

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). "Trial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."). As this Court has observed:

> This requirement of neutrality in adjudicative proceedings safeguards the

> two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

What constitutes a disqualifying interest "cannot be defined with precision. Circumstances and relationships must be considered," *In re Murchison*, 349 U.S. at 136. Nonetheless, this Court has repeatedly held that "[e]very procedure which would offer a possible temptation to the average . . . judge . . . not to hold the balance nice, clear, and true" denies due process of law. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *accord Aetna*, 475 U.S. at 825 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Nor does the Due Process Clause of the Fourteenth Amendment require a showing of actual bias before a judge must be recused. As this Court has noted:

> Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

In re Murchison, 349 U.S. at 136 (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954)); *accord, Concrete Pipe & Prods.*, 508 U.S. at 618 ("[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.") (quoting *Marshall v. Jerrico*, 446 U.S. at 243 (brackets in original)).

Whether or not campaign contributions from litigants and their attorneys actually affect a judge's conduct in a case, the Due Process Clause forbids even the "possible temptation to the average man as a judge" not to be neutral and detached. *Concrete Pipe & Prods.*, 508 U.S. at 617-618 (quoting *Ward*, 409 U.S. at 60) . Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927) , this Court reversed a conviction adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made. Similarly, as this Court observed in requiring the recusal of a State Supreme Court Justice whose decision was argued, as here, to have been influenced improperly:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'"

Aetna, 475 U.S. at 825 (*quoting Ward*, 409 U.S. at 60 (*quoting Tumey*, 273 U.S. at 532)) . The Due Process test is therefore not actual bias, but rather the "appearance of justice."

Because the Illinois Supreme Court (like the Alabama Supreme Court in *Aetna*) never explained why due process was not violated under the circumstances in this case, the Court can look to State Farm's Opposition wherein State Farm argued that the appearance of impropriety standard was not applicable to this case. (App. 270-275). If this is the reason that the Illinois Court relied on, it is plainly invalid under this Court's Due Process decisions unless one of two distinctions applies. *First*, it might be argued that recusal is not required because the massive contributions at issue were permitted by Illinois law. However, in all of the other Due Process cases, especially *Ward* and *Tumey*, the conduct that gave rise to the Due Process claim was mandated by law, and yet this Court found a Due Process violation. *Second*, in the other cases, the benefit to the judge would arise in the future, whereas here all of the campaign contributions had already been given. However, if timing were significant on the issue of an appearance of partiality, none of the laws placing limits on campaign contributions for any elected office could be upheld. Moreover, no case has ever drawn such a distinction, and the appearance problem may actually be greater where the arguable quid pro quo has already been given than when it might occur in the future.

This Court has never directly addressed the requirements of recusal under the Fourteenth Amendment's Due Process Clause as a result of the appearance of impropriety and the effect on public perceptions of the integrity of the courts caused by large campaign donations to judicial candidates. However, as Justice O'Connor has suggested, the potential for an appearance of bias is clear:

> relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. * * * Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., *concurring*).

Indeed, these very concerns are what animate and justify this Court's decisions upholding legislative limits on campaign contributions generally: "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). Other courts have also recognized the improper appearance created by judges accepting and soliciting contributions from lawyers and parties appearing before them. *See, e.g., Stretton v. Disciplinary Bd. of the Supreme Court of Penn.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court"); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) ("difficult case" would be presented if attorney gave significant financial support to judge's campaign committee while judge presided over case in which attorney was involved).

Under *White*, the First Amendment requires substantial leeway in enacting rules governing what States may forbid candidates for judicial office from saying, and under *Buckley* and its progeny, the

government may not set contribution limits so low that they prevent candidates (including candidates for judicial office) from raising the money needed to get their message out to the voters. As a result, in the context of judicial elections where campaign contributions from interested persons play a substantial role, the only way to provide appropriate Due Process protection is to disqualify judges whose impartiality may reasonably be questioned as a result of having been financially supported in substantial ways by a party to a lawsuit or counsel for that party.

Because what is sufficient to disqualify a judge "cannot be defined with precision," *Aetna*, 475 U.S. at 822 (*quoting Murchison*, 349 U.S. at 136), this Court has looked at all the factors that might give rise to an appearance of bias. *See, e.g., Aetna*, 475 U.S. at 822-25; 475 U.S. at 829-30 (Brennan, J., concurring). Petitioners do not take the position that a judge must step aside in any case in which a party or its attorney makes a contribution however small to that judge's campaign. Rather, whether Due Process requires recusal must be based on a consideration of a number of factors, such as the size of the contribution made by the party and those aligned with it; the total amount of money raised and spent on the judge's election; the timing of the contribution in relation to the judicial decision; and any other connections between the party and the judge's campaign.

In invoking the Fourteenth Amendment Due Process requirements in this case, Petitioners did not seek recusal of Justice Karmeier solely on the basis that campaign contributions were made to Judge Karmeier by State Farm and its allies. Rather, as they argued, the "appearance of justice" (and perhaps the eventual result in this case) was distorted by the (1) timing of these donations (which occurred during the pendency of this case before the Supreme Court of Illinois when there was a real or reasonably assumed belief that Justice

Karmeier's vote might be decisive); (2) the massive size of these donations (a total of more than $350,000 in direct donations, with more than a million dollars more in indirect donations, out of a total of about $4.8 million, or almost one-third of the amount raised); and (3) the specific and substantial relationship between Judge Karmeier, his election proponents, and State Farm. Nonetheless, the Supreme Court of Illinois evidently not only did not see the appearance of impropriety that was so obvious to the media and the public, but it did not even think that Petitioners' Due Process claim was worthy of a response. The only conclusion, given the facts of this case, is that, in Illinois, no amount of contributions, no matter when given or under what circumstances, can ever be the basis for a judicial recusal. Because such a position is completely at odds with what this Court has held in other Due Process cases challenging judicial partiality, the Court should grant review and set aside the decision below.

II. The Decision Below Conflicts With Decisions Of Other Highest State Courts Applying This Court's Due Process Jurisprudence

At least two Highest State Courts – Florida and Oklahoma -- have reached sharply different standards from those which evidently guided the court below in applying this Court's Fourteenth Amendment jurisprudence. One other state – Texas – follows what appears to be the Illinois approach under which lawful campaign contributions are never a basis for recusal. *See Apex Towing Co. v. Tolin*, 997 S.W. 2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from opposing counsel and from one of the parties"), *rev'd on other grounds*, 44 Tex. Sup. Ct. J. 470, 41 S.W. 3d 118 (2001); *Texaco, Inc. v. Penzoil Co.*, 729 S.W. 2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit), *cert dismissed*, 485 U.S. 994 (1988), and superseded by Tex.

R. App. P. 47(b)(2) and Tex. Civ. Prac. & Rem. Code § 52.002, as stated in *Isern v. Ninth Court of Appeals*, 39 Tex. Sup. Ct. J. 785, 925 S.W. 2d 604 (1996). The precise facts of each case are, not surprisingly, different (and not surprisingly no reported case has ever involved contributions of the size at issue here and made while the case was awaiting decision). But, as we now show, there can be no doubt that the approach taken by the Florida and Oklahoma Supreme Courts on the issue of the Due Process implications of contributions to a judicial candidate are in direct conflict with that followed in Illinois.

In *MacKenzie v. Super Kids Bargain Store, Inc.*, 15 Fla. L. Weekly 5397, 565 So.2d 1332 (1990), the Florida Supreme Court reviewed a decision holding that a $500 contribution made to a campaign for judicial election required recusal. Noting that Florida law both limited such donations to $1,000 (Illinois has no limits) and required full disclosure of the sources of any donations, the Florida Court held that a $500 donation was "legally insufficient when presented as the sole ground for disqualification." *Id.* at 1336. The Florida Court, however, went on to indicate that larger donations, made to a "judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit" or where there was "a *specific and substantial political relationship*" were "additional factors," beyond the fact of a small donation, which might indicate a substantial enough connection to require recusal. *Id.* at 1338 n.5 (emphasis in original). Such "additional" factors are clearly in evidence here. The Due Process standard set by the Florida Supreme Court was therefore far different than the standard applied in this case.[5]

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[5] In addition to those factors discussed above, an additional reason for recusal in this case is the harsh and very personal nature of the race between now Justice Karmeier and his opponent, then Judge Gordon Magg,

The Oklahoma Supreme Court in *Pierce v. Pierce*, 2001 OK 97, 39 P.3d 791 (2002), also explored the interplay of campaign contributions and Constitutional Due Process. The *Pierce* Court found, as the *MacKenzie* Court implied it would find on similar facts, that "due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Pierce*, 39 P.3d at 799 (emphasis in original). Addressing contributions totaling $10,000 from counsel and counsel's father "during the litigation and prior to trial," *id.* at 798, the Oklahoma Court found that the Due Process Clause required recusal. In Petitioners' view, the appearance of partiality is far stronger in this case given State Farm's much closer connection to, and larger support of, Justice Karmeier. At the very least,

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who authored the Appellate Court opinion under review below. See *Non-Participation Mot.* at 3-6, App. 291-294. The likelihood of actual bias is highlighted because, as State Farm pointed out below, certain lawyers for Petitioners made campaign donations to the Democratic Party, which State Farm implied were then sent on to Judge Magg's campaign. See *S. Ct. Rule 328 Affidavit of Theresa M. Donell* at Exh. J-K (filed below). Petitioners agree that donations that are passed through other organizations must be considered in the Due Process analysis. However, Petitioners' donations would have been of no significance had Judge Magg been elected because he would have had to recuse himself in any event as the author of the opinion under review. Nevertheless, Petitioners' contributions are relevant to the Due Process analysis now before this Court as they provided further reason for the public to believe that Justice Karmeier was biased against Petitioners, whose lawyers had contributed to his opponent, and that it affected his eventual vote in this matter. *See e.g. MacKenzie, supra,* 565 So.2d at 1338-1339.

the unwillingness of the Supreme Court of Illinois to deal with the Due Process implications of these massive contributions, made while this case was pending there, is wholly at odds with what the Oklahoma and Florida Supreme Courts have done in analogous situations, and therefore constitutes an additional basis for review by this Court.

III. This Case Presents An Ideal Vehicle For Deciding An Important And Pervasive Issue That Rarely Will Reach This Court

This petition comes to this Court with the Due Process issue starkly and squarely presented. There is no doubt that the Due Process claim was directly and clearly raised in the Illinois Supreme Court by the original motion for recusal and then again on rehearing and that the court below rejected the claim, apparently because there is a per se rule permitting any and all campaign contributions to be made to judges in Illinois without triggering a recusal. There is also no doubt that the contributions here were very substantial, by any measure, and that Justice Karmeier cast the deciding vote on a part of this case in which as much as $456,000,000 was at stake. Unlike in Florida and Oklahoma, where the precise contours of the Due Process right to recuse a judge who arguably has been unduly influenced by campaign contributions could be determined in the future, the decision in this case appears to close the door to any further similar challenges in Illinois, unless this Court intervenes and corrects the error of the court below.

The absence of an alternative forum for challenging this no-recusal rule is demonstrated by other cases in which such alternatives have been tried. Thus, in the face of the Texas rule, which is similar to that adopted in Illinois, two consumer groups and five lawyers, who themselves did not and/or would not make substantial contributions in judicial elections and who

represented clients who were in the same position, sued in federal court in an attempt to have the constitutionality of the Texas approach determined, but the Fifth Circuit found that the federal courts could not entertain such a claim. *Public Citizen, Inc. v. Bowen*, 274 F.3d 212 (5th Cir. 2001). A similar attempt to avoid raising this issue in state court was rejected in *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 309 (E.D. Pa. 1998), with the court holding that any Due Process violation based on a failure of a state trial court judge to recuse was addressable only by appeal to a neutral decision-maker in the state court system. Thus, from a procedural perspective, review on certiorari by this Court is the only way in which any federal court can pass on this issue. Even if a litigant were willing to challenge a state court judge who is sitting on his or her case on account of the judge's receipt of campaign contributions, it would be impossible for a state-court litigant to bring the issue to this Court until after entry of a final judgment. *See Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). That assumes that a litigant (and his or her counsel) would be willing to make such a challenge in the face of state law clearly to the contrary, for fear of increasing the bias that they believe already exists.[6]

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[6] Evidence of the widespread perception resulting from the circumstances of the *Avery* decision that (1) justice was for sale, and (2) that litigants should not embark on a futile effort to challenge justices for fear of what reaction the challenge might provoke, are both found in *Price v. Philip Morris, Inc.*, ___ N.E.2d ___, 2005 WL 3434368 (Ill. Dec. 15, 2005), in which the same Supreme Court of Illinois overturned a $10.1 billion fraud verdict against Philip Morris, Inc., and in which Justice Karmeier again cast the fourth vote for reversal. As the *Chicago Tribune* noted in its December 16, 2005 story, despite the fact that "Lawyers for Philip Morris U.S.A. contributed $16,800 to help elect a judge who cast the deciding vote" and "the

The need for guidance by this Court as to the interplay between the First Amendment rights of judicial candidates, *see Republican Party of Minn. v. White, supra*, and the Due Process rights of litigants to an impartial decision-maker, is a further reason for this Court to grant review. Although the issue in *White* was limited to the validity of the state law prohibitions on speech, none of the five opinions suggested that recusal would not be available to protect the right to a fair trial of those who claim that remarks by a judicial candidate during an election race evidenced the kind of closed mind that would be the basis for recusal. Indeed, Justice Scalia's majority opinion observed that the Due Process rights protected by the Fourteenth Amendment have "coexisted with the election of judges ever since it was adopted," *White*, *supra*, 536 U.S. at 783, which can be true only if recusal is available when the First Amendment permits campaign speech or, as here, campaign spending. Thus, because Illinois has set no contribution limits in judicial races, and because the First Amendment would require that any limits it set not be unreasonably low, the inevitable clash between Due Process and the First Amendment in this area can only be resolved by this Court granting review and holding

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judge also received $1.2 million in campaign money from a group that filed an amicus brief supporting the cigarette maker," no motion for recusal was filed. *Philip Morris law firms, supporters backed Judge*, Chicago Tribune, December 16, 2005 at 1. As the article further noted, quoting Cindi Canary, director of the Illinois Campaign for Political Reform, "[t]he system creates the perception that money is influencing justice." *Id.* The article also quoted Edward Murnane, president of the Illinois Civil Justice League, which contributed $1.2 million to the Karmeier campaign and filed an amicus brief supporting Philip Morris, as stating: "Karmeier's election changed the vote." The same observation could fittingly describe the *Avery* vote.

that recusals are guaranteed by the Due Process Clause when campaign contributions of this magnitude are made by a party to a pending lawsuit to a judge sitting on the case.

The problem of recusals and campaign contributions in judicial elections is not limited to financial support from defendants. For better or worse, the arms race here is waged by both sides, as evidenced by the fact that certain of Petitioners' own counsel made substantial contributions to support Justice Karmeier's opponent.[7] The same is also true in other big money judicial election states, such as Ohio, Texas, Alabama and Mississippi (*see, e.g., Rachel Weiss, Fringe Tactics, Special Interest Groups Target Judicial Races,* The Institute on Money in State Politics (August 25, 2005), www.followthemoney.org/press/reports/200508251.pdf). *See also White, supra,* 536 U.S. at 789-90 (O'Connor, concurring) (further examples of massive spending on judicial elections). This Court cannot halt that race, but it can assure that those who cannot or chose not to make contributions to judicial candidates will not be denied neutral decision-makers because their opponents or their lawyers made a different choice. Given the importance of the interests at stake, and the conflicts in opinions as to the proper balance between the First Amendment rights of judicial candidates to raise and spend money on their elections and the countervailing Due Process right of

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[7] While here, election of Karmeier's opponent could not have resulted in an additional vote for Petitioners (because, as a member of the Appellate Court that decided *Avery* he could not have sat in decision on the case under Illinois law), the larger point is the recurring danger to due process when politics, the provenance of legislatures, intrudes into the courts, whom we entrust with the fair and impartial administration of justice—an equal entitlement of those whose candidates lose, as well as win, elections.

litigants, this Court should grant review of the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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DECEMBER 27, 2005

Counsel for Petitioners

No. 05-

IN THE
Supreme Court of the United States

MICHAEL E. AVERY, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITIONERS' APPENDIX

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SUPREME COURT OF ILLINOIS

Michael AVERY et al., Appellees, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant.

Opinion filed Aug. 18, 2005.

CHIEF JUSTICE McMORROW delivered the opinion of the court:

Michael Avery and other named plaintiffs brought a class action in the circuit court of Williamson County against defendant, State Farm Mutual Automobile Insurance Company (State Farm). Representing a nearly nationwide class of State Farm policyholders, plaintiffs alleged claims sounding in breach of contract and statutory consumer fraud, in addition to a claim seeking declaratory and injunctive relief.

The circuit court certified the class. The breach of contract claim was tried before a jury, and the remaining claims received a simultaneous bench trial. The jury returned a verdict in favor of plaintiffs on the breach of contract claim, and the circuit court entered judgment in favor of plaintiffs on the consumer fraud claim. With regard to the third count, the circuit court granted declaratory relief but declined to grant injunctive relief. The damages awarded to plaintiffs totaled $1,186,180,000.

The appellate court affirmed the judgment, with one exception. The appellate court reversed a portion of the damages, lowering the total award to $1,056,180,000. 321 Ill.App.3d 269. We allowed State Farm's petition for leave to appeal. 177 Ill.2d R. 315(a).

Plaintiffs' suit centers on certain automobile repair part categories which have been identified in the record and to which we refer throughout our discussion. "Crash parts" refers to automobile components that are used to replace parts damaged in a crash, rather than parts that have failed mechanically. They are primarily sheet metal and plastic parts that are attached to the outer shell of the car. Crash parts consist of two categories. The first category is comprised of new parts made by or on behalf of the automobile's original manufacturer. These parts are commonly referred to as "Original Equipment Manufacturer" parts, or "OEM" crash parts. The second class includes aftermarket parts made by companies not affiliated with original equipment manufacturers. These parts are referred to as "non-OEM" crash parts.[1]

A succinct general overview of plaintiffs' theory of the case may be found in "Plaintiff's Memorandum in Support of Application of Illinois Law to the Claims of Class Members Under Illinois Choice of Law Doctrine":

> "In this case, plaintiffs have placed at issue the propriety of State Farm's uniform practice of specifying the use of non-OEM crash parts to repair its

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[1] The non-OEM crash parts involved in this case are: (1) fenders; (2) hoods; (3) doors; (4) deck lids; (5) luggage lid panels; (6) quarter panels; (7) rear outer panels; (8) front-end panels; (9) header panels; (10) filler panels; (11) door shells; (12) pickup truck beds, box sides, and tailgates; (13) radiator/grill support panels; (14) grilles; (15) headlamp mounting panels/brackets/housings/lenses/doors; (16) taillight mounting panels/brackets/housings/lenses; (17) outer body moldings; (18) door body side moldings; (19) front wheel opening moldings; (20) side moldings; (21) front and rear fascias; (22) outer panel mounting brackets, supports, and surrounds; (23) bumpers (excluding chrome bumpers); (24) bumper covers/face bars; and (25) bumper brackets/supports.

> policyholders' car[s] in every instance in which such cheaper parts are available. * * * Plaintiffs contend that this policy breaches State Farm's standard contract because it is not designed to restore policyholders' cars to their pre-loss condition by using parts of like kind and quality. Plaintiffs further contend that this practice violates Illinois' consumer law because the practice itself and its economic ramifications constitute a violation of Illinois consumer statutes, which prohibit[] misrepresentations as to the 'standard, quality, or grade' of the goods and services provided under State Farm's policies. [Citation.] At trial, the Court and jury must resolve the classwide question of whether State Farm, by requiring the uniform use of non-OEM crash parts, and through the course of conduct it designed to conceal the true import of this practice from its policyholders, breached its contractual obligations and committed consumer fraud."

This opinion is divided into two principal sections: "Breach of Contract" and "Consumer Fraud." In a third section, we deal with plaintiffs' claims for declaratory and injunctive relief. These sections are further subdivided, as required by the various arguments and issues, as follows:

I. Breach of Contract

A. *Propriety of the Nationwide Contract Class*

B. *Whether the Verdict May Be Affirmed with Respect to Subclasses*

1. The Massachusetts and "Assigned Risk" Policies

2. The "You Agree" Policies

We begin with plaintiffs' breach of contract count.

I. Breach of Contract

Plaintiffs' original class action complaint, which was filed in July 1997, was amended several times. The trial, which took place in 1999, was predicated upon plaintiffs' third amended class action complaint. Count I (breach of contract) of the third amended complaint alleged that State Farm breached its "uniform insurance contract" with its policyholders. Plaintiffs alleged that, under the terms of this contract, State Farm promised "to restore plaintiffs' vehicles to their pre-loss condition using parts of like kind and quality." According to plaintiffs, the term "like kind and quality," as stated in this promise, meant "like kind and quality to OEM parts." However, plaintiffs also

alleged that the non-OEM parts at issue in this case were categorically inferior to their OEM counterparts. Under plaintiffs' view, non-OEM parts could *never* satisfy State Farm's "like kind and quality" obligation. Plaintiffs alleged: "As a practical matter, [State Farm's] obligation could be met *only* by requiring the *exclusive use* in repairs *of factory-authorized or OEM parts.*" (Emphases added.)

In urging the certification of their claim as a class action, plaintiffs alleged that State Farm's contractual agreement with its policyholders was a uniform "Policy," in the singular, with "the same or common general terms." State Farm argued, to the contrary, that there was no uniform State Farm automobile insurance policy nationwide, and individual issues therefore would dominate the contract claims, rendering classwide determinations impossible. See 735 ILCS 5/2-801(2) (West 1998). According to State Farm, some of its policies included a promise to pay to repair the vehicle with parts of "like kind and quality," but other policies did not contain this provision. State Farm added that, in many states, its policies explicitly provided for the specification of non-OEM parts sufficient to restore the vehicle to its "pre-loss condition." Still other State Farm automobile insurance policies contained neither the "like kind and quality" nor the "pre-loss condition" language. State Farm pointed, for example, to its Massachusetts policies, which promised simply to pay "the actual cash value" of "parts at the time of the collision." Another group of policies that contained neither the "like kind and quality" nor the "pre-loss condition" language were the majority of State Farm's "assigned risk" contracts, which were written for the "residual market" of high-risk consumers whom states *required* insurers to cover. According to State Farm, most of these assigned risk

policies promised simply to pay the "[a]mount necessary to repair or replace the property."

State Farm also argued that there were substantive conflicts of law between Illinois and other states, and therefore it would be improper to apply Illinois law to the contract claims of class members nationwide. State Farm contended, in addition, that Illinois lacked significant contacts with the claims of class members in other states and the imposition of Illinois law with regard to their claims would violate constitutional rights. See *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 86 L.Ed.2d 628, 105 S.Ct. 2965 (1985).

Following a hearing, the circuit court certified plaintiffs' claims as a 48-state class action. The circuit court rejected State Farm's arguments, finding that Illinois law could be applied to the claims of the entire class and that this imposition of Illinois law presented no constitutional difficulties. The court also rejected State Farm's argument that there was no standard form insurance policy. The court took the position that the specific form of the individual policies was immaterial so long as the operative contractual language in each policy was susceptible of uniform interpretation. The court declined to address this issue at the certification stage, maintaining instead that the question of whether the language in State Farm's various policies could be given a uniform interpretation should be resolved at trial.

In reaching its decision to certify the class, the court concluded that there were questions of fact or law that were common to the class, and these questions predominated over any questions affecting only individual members. 735 ILCS 5/2-801(2) (West 1998). The court pointed

to what it termed State Farm's uniform practice "throughout the United States" of specifying non-OEM parts on policyholders' repair estimates. According to the court, the members of the plaintiff class had a "common interest" in determining whether this practice constituted a breach of State Farm's contractual obligation. In the court's view, this common interest predominated over questions affecting individual class members.

In an "Order Regarding Law to be Applied to Class Members' Claims," the circuit court explained its reasoning for applying Illinois law to class members' claims nationwide. The court stated:

> "With respect to the breach of contract claims, the court finds that there are no true conflicts of law raised by the specific claims or facts at issue in this case which require application of the law of any state other than Illinois. Illinois possesses sufficient contacts such that the application of Illinois law to the breach of contract claims in this case is neither arbitrary nor unfair and comports with due process. Application of Illinois law to the breach of contract claims does not implicate the interests of any other jurisdiction and application of its law to these claims. Finally, the application of Illinois breach of contract standards, which are identical to those in other jurisdictions, does not interfere with any state's legislative or legal choices."

Based on its finding that class members had a "common interest" in determining whether State Farm's "uniform" practice of specifying non-OEM parts breached State Farm's contractual obligation, and that Illinois law could be applied to class members' claims nationwide, the circuit court certified the following class:

> "All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1987, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) 'crash parts' installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996."

Following entry of the circuit court's order certifying the class, State Farm sought from this court a writ of *mandamus* directing the circuit court to reverse the order. State Farm suggested in the alternative that this court reverse the circuit court's certification order pursuant to our supervisory authority. State Farm also moved for transfer, consolidation, and a stay of proceedings. This court entered an order in which we took "no action" on State Farm's various requests because there were insufficient votes either to allow or to deny.

In the circuit court, State Farm subsequently moved for summary judgment on the class claims and for decertification of the class. The circuit court denied these motions. State Farm also moved for summary judgment